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In the Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 427.

LOUIS VANACEK,
Petitioner,

vs.

ST. LOUIS PUBLIC SERVICE COMPANY,, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

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On Petition for Writ of Certiorari to the
Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

There is no authority conferring jurisdiction upon this Court in the instant case. More particularly, jurisdiction is not conferred under the Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U. S. C. A. 1257 (3), which provides:

> "'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

The total absence of jurisdiction is established by the following facts:

1. No federal question was timely raised, properly presented or ruled upon by the court below.

2. The decision of the Supreme Court of Missouri involved solely a matter of local law, contract and statute.

3. The decision of the Supreme Court of Missouri was consistent with applicable decisions of this Court.

4. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution has no application to the Petitioner's Question Presented in this case.

5. There is an absence of any federal question in this case.

QUESTIONS PRESENTED.

The Question Presented for Review by the Petitioner does not express the real issues.

There are three questions:

1. Is a party entitled to have a judgment of the highest court of a State reviewed by this Court where no appropriate action was taken in the state court to secure such review?

2. Apart from fatal procedural defects, does the Equal Protection Clause apply to a Plaintiff denied relief against a Defendant having no interest or ownership in, or control over, the premises containing the defective condition causing the injury complained of where the evidence (Def. Ex. 1; R. 287-293; Def. Ex. 4; R. 314; Def. Ex. 5; R. 315; Def. Ex. 6; R. 316) establishes that the Defendant divested itself of all interest and control in the premises six weeks before the injury occurred?

3. Can the action of the Supreme Court of Missouri in denying, without hearing or comment, Petitioner's Motion for Rehearing be considered as their having passed upon the federal question raised in the Motion for Rehearing?

ARGUMENT.

I.

No Federal Question Was Timely Raised, Properly Presented or Ruled Upon by the Court Below.

Petitioner argues that a contract between the Respondent and the City of St. Louis, to which he was not a party, forms the keystone of an abridgement of his rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. That such argument fails substantively will be established later herein, that it fails procedurally is patent. Petitioner offered no objection at the trial to the introduction of the contract (Def. Ex. 1; R. 287, 307) nor to any of the proceedings, reports or orders of the Missouri Public Service Commission from which the authority for the contract emanated (Def. Ex. 2; R. 296-307), nor was objection raised to any of the documents dated subsequent to the contract which established the effective date of the abandonment of the premises by the Respondent, under the contract, as September 4, 1956—six weeks before the Petitioner's injury (Def. Ex. 3; R. 314; Def. Ex. 4; R. 315; 316; Def. Ex. 5; R. 316; Def. Ex. 6; R. 316, 317).

A second opportunity was available to the Petitioner to raise federal questions as the appeal of his case proceeded to Division One, Supreme Court of Missouri, where argument of counsel was heard; again the Petitioner was silent.

The cause was then transferred to the Supreme Court of Missouri En Banc, there having been less than a majority vote in Division One. At this juncture, Petitioner was for a third time upon the threshold of opportunity and declined to cross. The assistance of Division One in preparing the majority and dissenting opinions not to be

filed[1] in the case but to aid counsel in their briefs to be used in the court en banc (App. 9, R. . . .) was ample notice of a divided judiciary on the issues of the case.

The Supreme Court of Missouri En Banc heard argument, rendered its opinion and its judgment and only at this point, in the afterglow of the litigation, did the Petitioner venture forth to seek rehearing upon constitutional grounds.

The law on these points is incisive. One of the earlier Missouri cases, *Phippin v. Mo. Pac. R. Co.*, 1906, 93 S. W. 410, 196 Mo. 321, involving a Petition for Rehearing before the State Supreme Court held:

> "To recognize the practice of injecting into a case for the first time after a final judgment and opinion by the Supreme Court a new proposition would be subversive to all our rules of practice and directly in the teeth of our rules".

Without citing cases from the years between, we quote briefly from *Center School District No. 58 of Jackson County v. Kenton*, Mo. 1961, 345 S. W. 2d 120, which stated:

> "Appellants' motion for rehearing or for transfer to the court en banc on the ground that they had been deprived of due process must be denied where the

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[1] In the Appendix to the Petition for Writ of Certiorari, p. 28, Petitioner states the opinion in this case by Hon. Cullen Coil, Comm'r, was filed in Division One. This is not correct, the opinion was never filed (App. 9, R. . . .) and any use of or reference to it is improper. The Supreme Court of Missouri has held that when a case is transferred from a division of the Supreme Court to the court en banc, the case stands as if it had not been previously heard and submitted and the original opinion of the Supreme Court which is rejected becomes a nullity as though it had never been written (See In Re Thomasson's Estate, Mo. 1946, 192 S. W. 2d 867).

Respondent has printed in its appendix, pursuant to Rule 23 (i) of the Rules of this Court, dissenting opinion from Division One which was adopted with amplification by the court en banc.

appellants did not invoke the due process clause either at trial or on appeal".

No series of citations is required to remind this Court of the occasions upon which it has ruled that the application by a state court of its local laws is controlling here, thus the prohibition under Missouri law of raising new issues, state or federal, on motion for rehearing is binding upon this Court (See *Scripto, Inc. v. Carson*, Fla. 1960, 362 U. S. 207, 80 S. Ct. 619, 4 L. Ed. 660).

It is axiomatic that denial of a motion for rehearing without hearing or opinion on the motion does not amount to the court having passed upon the questions raised in the motion (See *Mutual Life Insurance Company of New York v. McGrew*, Cal. 1903, 188 U. S. 291, 23 S. Ct. 375, to *Walters v. City of St. Louis*, Mo. 1954, 347 U. S. 231, 74 S. Ct. 505).

II.

Decisions of State Courts Involving Local Laws Provide No Basis for Invoking the Jurisdiction of the Supreme Court of the United States.

Black v. Cutter Laboratories, Cal. 1956, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188, rehearing denied 352 U. S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69, concerned a decision of the Supreme Court of California involving that court's application of local law in construing a local contract. Upon application for writ of certiorari, this Court stated that rulings of the highest court of a state on local law create no federal question and the petition would be dismissed.

Petitioner here is under circumstances similar to the Petitioner in *Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, Inc.*, Ala. 1952,

344 U. S. 178, 73 S. Ct. 196, in that this is the only case that can arise from the factual circumstances present at the time of the occurrence and under like conditions, it was held that the possibility of there never being a decision on the stated facts unless the Supreme Court took jurisdiction would not warrant the Court in enlarging its jurisdiction.

III.

The Action of the Supreme Court of Missouri on Petitioner's Motion for Rehearing is Consistent with Applicable Decisions of This Court.

Decisions of this Court that a federal question cannot be raised for the first time by a petition for a rehearing, after judgment in the highest court of a state, so as to bring the case within the appellate jurisdiction of the United States Supreme Court are legion, beginning with *Mergenthaler Linotype Company v. Davis*, Mo. 1920, 251 U. S. 256, 40 S. Ct. 133.

Also, assuming *arguendo* that there was involved a federal question, if there is also a non-federal question, as there is here, this Court has repeatedly held the non-federal question is sufficient to support the judgment and no jurisdiction arises in the federal Supreme Court. The existence of an adequate state ground to validate the judgment removes the case from consideration by this Court (See *Stembridge v. State of Georgia*, Ga. 1952, 343 U. S. 541, 72 S. Ct. 834; *Buck v. People of the State of California*, Cal. 1952, 343 U. S. 99, 72 S. Ct. 502; *Dixon v. Duffy*, Cal. 1952, 344 U. S. 143, 73 S. Ct. 193).

The application of Missouri tort law and the construction of a local contract between its residents is a sufficient non-federal ground to support the judgment of the Supreme Court of Missouri in this case.

IV.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States Has No Application to the Case Here Presented.

From the earliest interpretations, equal protection of the laws within the Constitutional guaranty has been held to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under similar circumstances (See *Bowman v. Lewis*, Mo. 1880, 101 U. S. 22, 25 L. Ed. 989; *Cunningham v. United States*, 256 F. 2d 467).

To constitute a denial of equal protection of laws, there must have been purposeful discrimination against one person in favor of another person in like circumstances without a rational basis for differentiation between the two. *Marquez v. Aviles*, 252 F. 2d 715, certiorari denied 356 U. S. 952, 78 S. Ct. 917. Obviously, the Petitioner here does not come within a class which was denied equal protection nor has he established discrimination between himself and another under the existing circumstances, thus there is no denial of his rights under the Fourteenth Amendment (see *Tonkins v. City of Greensboro*, N. C., 162 F. Supp. 549, opinion supplemented 175 F. Supp. 476).

V.

There Is No Federal Question Here Presented.

This action was decided by the highest court of the State of Missouri upon that court's interpretation of a local contract to which local law, common and statutory, was applied. The Missouri Supreme Court did not pass upon a federal question, nor was any before it; the *sub-*

stance of the action was non-federal and it does not require the citing of authority to conclude that no untimely *procedural* device can supply the fatal jurisdictional defect apparent from the Petition itself.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

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APPENDIX.

Dissenting Opinion From Division One, Supreme Court of Missouri.

In the Supreme Court of Missouri,
Division Number One.

September Session, 1961.

Louis Vanacek,
Respondent,
v.
St. Louis Public Service Company,
a Corporation,
Appellant.
No. 48,474.

Dissenting Opinion.

Following abandonment by defendant of the Broadway line with the permission of Public Service Commission, under contractual arrangements with the city, "* * * this defendant's liability would depend upon whether its duty with reference to the track still existed." Wells v. City of Jefferson, Mo. Sup., 132 S. W. 2d 1006, 1007. The duty of defendant to maintain the track in question in a reasonably safe condition and its right to use the street were coextensive with the existence of its permit. Compare The Brick and Terra Cotta Co. v. Hull, 49 Mo. App. 433; 83 C. J. S., Street Railroads, § 124. It was not a perpetual duty. The duty was contingent in nature, depending upon the continued existence of the relationship. The duty did not continue after the termination of the status or relationship between the Public Service Company, the city, and the public as to the Broadway car line. The duty no longer existed after the abandonment of the track and

permit by order of Public Service Commission; the signing of the contract between the Public Service Company and the city agreeing with respect to improvement of the abandoned track areas, title to and control of the abandoned facilities, liability for future repair and maintenance, etc., and the giving of the agreed-upon notice to the city. The opinion, after recognizing that "at the time of plaintiff's injury, defendant had no duty to maintain the street in a reasonably safe condition" (Opinion, page 3), nevertheless holds this not decisive of the case. The opinion allows plaintiff to recover for an injury which occurred after the termination of defendant's duty. It holds defendant liable upon the basis of a pre-existing duty which no longer attached, arising out of a status which no longer existed.

In 38 Am. Jur., Negligence, § 18, these principles are expounded: Actionable negligence is negligence to the particular person injured. The basis of an action for negligence must be a violation of plaintiff's own right. The obligation must be due from defendant to the person injured. Davidson v. St. Louis-San Francisco Ry. Co., Mo. Sup., 229 S. W. 786, 788. It is not enough to show that the obligation was to another person or class, and that if performed as to them, plaintiff would not have been injured. "The wrongfulness of an act is found in its probable effect upon persons who are in some relation to the actor. As to unrelated parties, the happening is a pure accident. Facts which create a relation and therefore a duty as to one person do not establish the same obligation to all mankind. Accordingly, to be within the right created, the complaining party must show facts which make the reason for claiming a relationship applicable to him." In some situations the duty to use due care is general and owing to everybody. "A duty, however, which is owing to everybody cannot serve as the basis of an action for negligence until some individual is placed

in position which gives him occasion to insist upon its performance." 38 Am. Jur., Negligence, § 19. It then becomes a duty to him personally. 3 Cooley on Torts, 4th Edition, § 478, p. 366; Upp v. Darner, Iowa Sup., 130 N. W. 409, 410. In Upp v. Darner defendant, owner of a city lot, strung a barbed wire across the lot, contrary to a city ordinance. Then he sold the lot to another. Thereafter plaintiff's horse was injured and had to be killed, after coming in contact with the barbed wire. Plaintiff was an invitee of the purchaser. Held, no liability on the former owner because he was in no position to control the use of the property and under no duty to the grantee's invitee; plaintiff was a stranger to defendant, and defendant did not invite plaintiff onto the property.

Defendant Public Service Company owed the general traveling public a duty as long as it enjoyed its license as a carrier on the Broadway line. During the time it owed that duty, however, plaintiff was not placed in a position which gave him occasion to insist upon its performance. It was not until the relationship between the carrier and the public came to an end and the duty no longer existed that plaintiff's injury occurred and his rights arose. Then plaintiff and defendant were unrelated; were strangers. Defendant's rights and duties with respect to the maintenance of the tracks and space between them were then nonexistent. At that time defendant had no duty to inspect and no right to repair a discovered defect in the street or track, even if it had desired to do so. At that time defendant owed no duty with respect thereto to any member of the public. Plaintiff's only recourse was against the city under its duty to maintain the streets in a reasonably safe condition for the traveling public.

An action for negligence will not lie unless it appears that there existed, *at the time of the injury*, some legal duty or obligation on the part of defendant toward plain-

tiff, which defendant did not perform. 38 Am. Jur., Negligence, § 12; 83 C. J. S., Street Railroads, § 302 b, p. 446; 65 C. J. S., Negligence, § 186 a, p. 872; The Evansville and Terre Haute Rd. Co. v. Griffin, 100 Ind. 221, 222; Daugherty v. Herzog, Ind. Sup., 44 N. E. 457. The Kansas City Court of Appeals stated the rule, in a landowner-invitee case, as follows: "The precise duty that he owes depends upon the relationship that exists between the parties at the time an injury is suffered." Jennings v. Industrial Paper Stock Co., Mo. App., 248 S. W. 2d 43.

"No duty to plaintiff at time of injury, no liability on defendant." This is the general rule in vendor-vendee cases. Combow v. Kansas City Ground Investment Co., Mo. Sup., 218 S. W. 2d 539, and is the proper rule to apply in this comparable situation.

Respectfully submitted,

Houser, C.